CRIMINAL

COURT OF APPEALS

DECISION OF THE WEEK

People v Harris, 6/26/18 – **SUMMATION DENIED / NEW TRIAL**

At the defendant's bench trial on a class B misdemeanor, Criminal Court granted the parties permission to deliver summations. However, at the end of the trial, the court precluded closing statements, found the defendant guilty of a drug charge, and imposed a jail term of 90 days. The Appellate Term affirmed. In a memorandum decision, the Court of Appeals reversed and ordered a new trial. As a threshold matter, the claim was reviewable: in ruling that the defendant's permission to deliver a summation was rescinded and then rendering a verdict, the court deprived counsel of any practical ability to object. As to the merits, in *Herring v New York*, 422 US 853, the Supreme Court held that, by giving the trial court discretion as to granting the defense the opportunity to give a summation in a nonjury trial on an indictment, former CPL 320.20 (3) (c) violated a defendant's Sixth Amendment right to counsel. In the instant case, the trial court's imposition of a jail term required that the defendant be afforded the right to counsel at trial under the Sixth Amendment. *See Scott v Illinois*, 440 US 367. Daniel Schumeister represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2018/2018_04667.htm

People v Parker, 6/28/18 – ***O'RAMA* ERRORS / 4-3 SPLIT**

The two defendants challenged their convictions for second-degree robbery. Because the record failed to establish that counsel received meaningful notice of the actual content of two substantive jury notes, the trial court failed to meet its core obligation under CPL 310.30 and *People v O'Rama*, 78 NY2d 270. A mode of proceedings error had occurred. There was no record evidence that the notes were shown to counsel, only that counsel was made aware of them. That was not enough. An ambiguous or otherwise insufficient record could not be overcome with speculation about what might have occurred, Judge Rivera stated. In the majority's view, by advocating a reconstruction hearing, the dissenters (DiFiore, Ch. J., Garcia, J., Feinman, J.) sought to "retread old ground and make arguments we have previously rejected." A new trial was ordered. The Legal Aid Society of NYC (Lorraine Maddalo, of counsel) and the Center for Appellate Litigation (Matthew Bova, of counsel) represented the appellants.
http://www.nycourts.gov/reporter/3dseries/2018/2018_04776.htm

People v Morrison, 6/28/18 – **PEOPLE'S APPEAL / ANOTHER *O'RAMA* LAPSE / SAME SPLIT**

In a memorandum decision, the Court held that the trial court's failure to provide counsel with meaningful notice of a jury note required reversal. It was not enough that defense counsel may have been aware of the "gist" of the note. Where the record failed to show that counsel was apprised of the specific contents of the note, preservation was not

required. The trial court had an affirmative obligation to create a record of compliance. *See People v Watson*, 23 NY2d 986, 990. The jury note was not ministerial. Even if the note was requesting an instruction on whether to continue deliberating or return the next morning, the note also stated that the jury had reached a decision on counts two and three, but had "a lot of work to do" on count one. Upon receiving meaningful notice of such note, counsel might have requested a partial verdict or a modified *Allen* charge. Mary Humphrey represented the respondent.
http://www.nycourts.gov/reporter/3dseries/2018/2018_04777.htm

People v Myers, 6/27/18 – **WAIVER OF INDICTMENT / NO ORAL COLLOQUY REQUIRED**
The State Constitution, Article I, § 6 specifies that persons held for the action of a grand jury may waive indictment and consent to be prosecuted by information when such waiver is "evidenced by written instrument signed by the defendant in open court in the presence of his or her counsel." In the defendant's case, the record evidence sufficiently demonstrated that the proper procedure was followed. The State Constitution precluded a holding that a written waiver of indictment is always ineffective unless a judge conducts an oral colloquy on the record. Judge Wilson wrote for the majority. Judge Rivera dissented in an opinion in which Judge Feinman concurred.
http://www.nycourts.gov/reporter/3dseries/2018/2018_04685.htm

Matter of People v Juarez, 6/27/18 – **NONPARTY REPORTER / NO RIGHT TO APPEAL**
An order resolving a motion to quash a subpoena issued prior to commencement of a criminal action is a final and appealable order, since it is civil by nature. However, no appeal lies from an order arising out of a criminal proceeding absent specific statutory authorization. That restriction applies to an order determining a motion to quash a subpoena issued during a criminal action, whether the appellant is a party or nonparty to the action. The instant case involved a nonparty—a *New York Times* investigative reporter who had conducted a jailhouse interview with the defendant. The Court of Appeals reversed a First Department (143 AD3d 589) order quashing the subpoena issued in the underlying criminal trial regarding the killing of a toddler.
http://www.nycourts.gov/reporter/3dseries/2018/2018_04684.htm

FIRST DEPARTMENT

People v Ramon Perez, 6/26/18 – **FUGITIVE FOR 20 YEARS / APPEAL DISMISSED**
The defendant absconded during trial, was tried, and was convicted in absentia of drug and weapon charges. Defense counsel filed a notice of appeal. But the defendant did nothing to perfect the appeal while he remained a fugitive for nearly 20 years, until he was returned on a warrant. The People sought to dismiss the appeal based on the failure of timely perfection. New York County Supreme Court granted the application. The First Department affirmed. Under standards set forth in *People v Taveras*, 10 NY3d 227, dismissal was proper. The delay of 27 years—from the filing of the notice of appeal to the application for poor person relief and assignment of counsel—was caused by the defendant's actions. He was returned involuntarily. Certain record documents had been lost. The delay would severely prejudice the People if they had to retry the case. The

decision was made after appellate counsel was assigned and permitted to review the record, as required by *People v Reynaldo Perez*, 23 NY3d 89.
http://nycourts.gov/reporter/3dseries/2018/2018_04669.htm

SECOND DEPARTMENT

People v Vasquez, 6/27/18 – **SEXUAL PERFORMANCE BY CHILD / AGAINST WEIGHT**
The defendant was charged with multiple counts of possessing and promoting a sexual performance by a child. Prior to a nonjury trial, he withdrew his request for a *Huntley* hearing, opting to challenge the voluntariness of his statements during trial. However, Orange County Court held that the statements were deemed to have been made voluntarily. The defendant was convicted of multiple counts. The Second Department reversed and dismissed the indictment. County Court had erred in its ruling regarding the voluntary statement issue; and the verdict was against the weight of evidence. Testifying through a Spanish interpreter, the defendant had stated that he made many mistakes during the interrogation, which was conducted in English. The defendant further testified that he was not the sole user of the subject computer, and he had made an incriminating statement to protect a family member. Indeed, at trial, a family member acknowledged having downloaded the illicit materials. Benjamin Ostrer and Marissa Tuohy represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04761.htm

People v Gedeon, 6/27/18 – **YET ANOTHER *O'RAMA* ERROR / REVERSAL**
The Second Department reversed a Kings County conviction of murder and other crimes based on an *O'Rama* error. The trial court did not read the contents of several jury notes into the record, and there was no indication that the entire contents were shared with counsel. Even in the absence of an objection, reversal was required. A new trial was ordered. The Legal Aid Society of New York City (Steven Berko, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04751.htm

People v Ishtiaq, 6/27/18 – **TAXI/LIMO LICENSES / NOT "PROPERTY"**
A Queens County conviction of grand larceny in the third degree was based on the alleged theft of licenses from the New York City Taxi and Limousine Commission. The defendant had used forged documents to obtain insurance for his car service company vehicles, and then had used the insurance to procure the licenses from the TLC. The licenses were not "property" within the meaning of Penal Law § 155.35, the appellate court ruled. *See People v Sansanese*, 17 NY2d 302. Although the defendant's legal insufficiency claim was unpreserved, in the interest of justice, the count was dismissed. Appellate Advocates (Mark Vorkink, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04752.htm

People v Latham, 6/27/18 – **WAIVER OF APPEAL / INVALID**
In this appeal from a Kings County weapon conviction, the Second Department held that the sentence was not harsh and excessive. However, in finding that the purported waiver

of the right to appeal was invalid, the reviewing court provided an unusually detailed discussion of the flaws in the waiver and the requirements for a valid waiver.
http://nycourts.gov/reporter/3dseries/2018/2018_04753.htm

THIRD DEPARTMENT

People v Maus, 6/28/18 – **SORA / SUA SPONTE DEPARTURE / REVERSAL**
Rensselaer County Court classified the defendant as a level-two sex offender. The court's sua sponte assessment of 20 points under risk factor 4, without prior notice, deprived the defendant of a meaningful opportunity to respond to that assessment. The Third Department reversed and remitted the matter for a new hearing that complied with Correction Law § 168-n (3) and due process. Arthur Dunn represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04796.htm

FOURTH DEPARTMENT

People v Neulander, 6/29/18 **– TEXTS, LIES, AND CONVICTION / REVERSAL**
Following a jury trial, the defendant was convicted in Onondaga County of murdering his wife. The Fourth Department reversed. The trial court erred in denying the defendant's CPL 330.30 motion. Juror 12 engaged in text messaging about the proceedings. After being selected to serve, she received a text message from her father stating: "Make sure he's guilty!" During trial, she got a text from a friend asking if she had seen the "scary person"—that is, the defendant. Another friend texted: "I'm so anxious to hear someone testify against the defendant's daughter." The juror defied court admonitions to report such communications. The illicit messages were revealed by a discharged alternate juror. An inquiry ensued. The errant juror concealed her misdeeds and lied under oath. The motion court found no likelihood of prejudice to the defendant. The Fourth Department disagreed, declaring that every defendant had a right to be tried by jurors who followed court instructions and were truthful about salient misconduct. Juror 12's actions created a significant risk of prejudice to a substantial right of the defendant. Thus, a new trial was granted. Two justices dissented, opining that the defendant failed to establish prejudice. Alexandra Shapiro represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04925.htm

People v Pescara, 6/29/18 – ***BATSON* VIOLATION / NEW TRIAL**
The defendant was convicted of attempted aggravated assault upon a police or peace officer and other crimes. On appeal, he contended that peremptory challenges to six African-American prospective jurors constituted *Batson* violations. The Fourth Department agreed and granted a new trial. In response to defense objections, the prosecutor offered facially race-neutral explanations for five of the six challenges and asserted that the sixth prospective juror was not African-American. That juror stated that his parents were of Caribbean descent and he considered himself "black culturally." The trial court found that the juror was not African-American; and the prosecutor did not offer a race-neutral reason for that challenge. The Fourth Department observed that a *Batson* challenge may be based on color. Further, with respect to another *Batson* claim, the trial court failed to determine

whether the race-neutral explanation was pretextual. The Monroe County Public Defender (Janet Somes, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04927.htm

People v Oliver, 6/29/18 – **INEFFECTIVE ASSISTANCE / BUM STEER / REVERSAL**
The defendant pleaded guilty to one count of sex trafficking in satisfaction of an indictment charging him with several prostitution-related offenses. Following his conviction, he appealed from an order of Onondaga County Supreme Court denying his CPL 440.10 motion. The Fourth Department reversed. The defendant had leaned toward going to trial. Then defense counsel misadvised him that, if convicted after trial, he faced the possibility of 75 years of imprisonment—versus the true exposure of 15 to 30 years—and that sex trafficking was not a sex offense for SORA purposes. Counsel's erroneous advice deprived the defendant of the ability to make an intelligent choice between pleading guilty or proceeding to trial. The Hiscock Legal Aid Society (Piotr Banasiak, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04885.htm

People v Smith, 6/29/18 **– MISSING WITNESS CHARGE / DIVIDED COURT**
Upon a jury verdict in Monroe County, the defendant was convicted of attempted murder in the second degree and other crimes. On appeal, he contended that the trial court erred in refusing to deliver a missing witness charge. The Fourth Department held that the defendant failed to meet his initial prima facie burden of showing that the testimony would not be cumulative. Two justices dissented, stating that, under *People v Gonzalez*, 68 NY2d 424, the initial burden was satisfied by showing that an uncalled witness, believed to be knowledgeable about a material issue, could be expected to testify favorably to the opposing party, who could then show cumulativeness. Prior decisions had misapplied the *Gonzalez* framework and should not be followed. Aside from the victim and the uncalled witness, there were no other witnesses. The victim initially told the police that she could not identify the shooter, and her description was vague. Although at trial she identified the defendant as the shooter, he was a stranger to her and she did not know why he shot her. Considering the questions as to identification, the error in refusing to give the charge was not harmless, in the dissenters' view.
http://nycourts.gov/reporter/3dseries/2018/2018_04863.htm

FAMILY

FIRST DEPARTMENT

Matter of Jisselle F. v Jose T., 6/26/18 – **FATHER-IN-LAW ACTS OUT / HARASSMENT**
New York County Family Court found that the respondent—the petitioner's father-in-law—committed a family offense and ordered him to stay away from the petitioner and her dog for one year. The First Department affirmed. Although the trial court did not specify the degree of harassment, the evidence supported a second-degree offense. For an extended period, the respondent had been staying in the apartment of the petitioner and her husband (the respondent's son). The living situation became strained, and the son asked his father to vacate the apartment. The respondent reacted by threatening the petitioner, propositioning her, and trying to poison her dog; breaking items in the apartment; and walking around naked. Although the respondent ostensibly vacated the apartment, he

returned there to shower, nap, and dress—even though his son had never given him a key. Because of such conduct, the petitioner felt threatened and feared for her safety.
http://nycourts.gov/reporter/3dseries/2018/2018_04670.htm

Matter of Anonymous v Poole, 6/28/18 – **CHILD ON CAR HOOD/ INDICATED REPORT**
During a domestic dispute, the mother drove down the street while the father held their one-year-old child on top of her car's hood. The Office of Children and Family Services properly found that the mother maltreated the child, resulting in an indicated report. An evaluation of the reasonableness of a driver's reaction to an emergency was for the trier of fact. OCFS had properly determined that the mother's judgment fell short of acceptable standards.
http://nycourts.gov/reporter/3dseries/2018/2018_04833.htm

SECOND DEPARTMENT

Matter of Suffolk County DSS v Dominick C., 6/27/18 – **PATERNITY / EQUITABLE ESTOPPEL**
The petitioner commenced a paternity proceeding to adjudicate the respondent to be the father of the subject child. When the AFC asserted that the child considered another individual his father, the respondent moved to dismiss the petition based on equitable estoppel. Without a hearing, Family Court granted the motion. The mother appealed, and the Second Department reversed. The individual the child saw as a father should have been joined as a necessary party, and a hearing on equitable estoppel should have been held. The matter was remitted.
http://nycourts.gov/reporter/3dseries/2018/2018_04742.htm

Matter of Ledbetter v Singer, 6/27/18 – **TEMPORARY CUSTODY / FULL HEARING**
In Kings County Family Court, the father sought sole custody of the parties' children. Prior to completion of the hearing, Family Court granted temporary custody to the father. The Second Department stayed enforcement of the order pending appeal. *See* Family Ct Act § 1114. It was error to make the custody order based on controverted allegations without the benefit of a full and fair hearing, the reviewing court held. The matter was reversed and remitted. Schulte Roth & Zabel LLP represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04727.htm

Matter of Rose v Simon, 6/27/18 – **COURT ATTORNEY REFEREE / POWER EXCEEDED**
In Queens County Family Court, the parties' custody and family offense matters were heard and decided by a Court Attorney Referee. The mother appealed, and the appellate court reversed. The court's order of reference did not authorize the referee to hear and report or determine the mother's family offense petition. The parties had purportedly stipulated that the referee could hear and determine the father's custody petition, but they did not comply with CPLR 2104. Thus, the referee had the power only to hear and report findings. Both matters were remitted to a Family Court Judge. Larry Bachner represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_04736.htm

FOURTH DEPARTMENT

Raven F. (Nicholas F.–Angela C.), 6/29/18 – **ARTICLE 10 / NO ABUSE BASED ON DV**
Erie County Family Court erred in finding that the father neglected the subject child on the ground that he engaged in misconduct constituting a pattern of domestic violence when the child was "presumably present." *See Matter of Ilona H. (Elton H.)*, 93 AD3d 1165. However, the father did neglect the child based on his long history of mental illness and erratic behavior. Summary judgment finding derivative neglect was properly granted as to the younger child. The movant's submissions established an impairment of parental judgment creating a substantial risk of harm for any child left in the father's care. The neglect of the older child was sufficiently proximate in time to support a reasonable conclusion that the problematic conditions continued to exist. The father failed to raise an issue of fact.
http://nycourts.gov/reporter/3dseries/2018/2018_04868.htm

Matter of Jerrett v Jerrett, 6/29/18 – **SHARED CUSTODY / NO PROPORTIONAL OFFSET**
Onondaga County Family Court should have granted the mother's objection to a Support Magistrate's order deviating from the presumptive child support obligation. The parents shared custody, and the mother was the primary custodian. Shared custody arrangements did not alter the methodology of the CSSA. *See Bast v Rossoff*, 91 NY2d 723. The Court of Appeals has rejected the proportional offset formula, whereby the noncustodial parent's obligation would be reduced based on the amount of time that he or she spent with the child. Instead, a court had to calculate the basic obligation and order the noncustodial parent to pay his or her pro rata share, unless that figure was unjust or inappropriate. The Support Magistrate erred in determining that the child was spending sufficient time with the father to warrant a downward deviation. That was merely another way of applying the proportional offset method. Although "extraordinary expenses" incurred in exercising visitation may support a deviation, the father's costs of housing, clothing, and food did not qualify. There was no support for finding that the mother's expenses were substantially reduced due to the father's visitation expenses. The mother represented herself on appeal.
http://nycourts.gov/reporter/3dseries/2018/2018_04880.htm

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